The statement in *Chicopee* that there is authority for the adoption by a judge of findings proposed by counsel is not an expression of unqualified approval of such long, argumentative, slanted findings as were adopted by the District Court in this case and *Roberts* does not "expressly approve[s] the procedure followed by the District Court" (RB 2, 3). *Roberts* said that a trial judge has the right to request counsel to submit findings of fact and conclusions of law "to assist him in formulating his own findings and conclusions and reaching his decision", since, in "the process of studying the facts and the law, findings . . . proposed by the parties may" aid the judge "in drafting his own findings and conclusions". *Roberts* approved the adoption of findings proposed by a party which are "fully supported by the evidence" and "are directed to material matters" and said that "it may even be that in some cases the findings and conclusions proposed by a party are so carefully and objectively prepared that they may all properly be adopted".

An examination of the findings prepared by respondents in this case will show that they are not all "directed to material matters" or "objectively prepared" and we have shown without contradiction by respondents that the principal findings are in direct conflict with the record. Neither *Chicopee* nor *Roberts* approve such findings and respondents have found no other decisions to cite.

The assumption that underlies all the cases which discuss the preparation by the parties of findings of fact at the request of a court and the adoption of some of those findings is that, in arriving at its decision, the court will make a painstaking review of the record and will prepare its own findings of the facts, on which the decision is based. If some of the findings prepared by counsel are accurate and stated concisely and without bias, adoption of such findings by the Court is not objectionable, although such a case is exceptional and the practice is not to be

encouraged. In the present case, the District Court evidently did not examine the record before filing its opinion and findings, for, had it done so, it could not in good conscience have adopted as its own the erroneous statements in respondents' memorandum and findings. The District Court thus "departed from the accepted and usual course of judicial proceedings" and the Court of Appeals "so far sanctioned such [a] departure . . ., as to call for an exercise of this court's power of supervision".

Respondents' Comment on the Second Reason for Granting the Petition is Irrelevant

The second reason advanced by petitioner for granting the petition is that the courts below did not employ the criteria of Sec. 103 in holding the patents invalid in that the courts gave the word "obvious" of that section a meaning known only to themselves and not to be found in any dictionary and ignored the phrase "subject matter as a whole". Respondents do not deny these statements but argue the merits by attempting to show that the patents in suit are invalid for obviousness of the patented inventions in view of prior art, which was considered by the Patent Office in granting the patents, bolstered up by pictures of models which mis-represent the patented attachments.

The prior device relied on by respondents to establish invalidity of the patents in suit is the furnishing wheel feeder used with circular knitting machines for feeding a single yarn to the knitting needles. Such feeders are discussed in the petition (P. 7-9) and it is there pointed out that a furnishing wheel feeder is employed to produce an even and uniform feed of yarn and no use of such a feeder under control of a pattern mechanism to feed its yarn at an irregular rate determined by the pattern is known. Respondents' explanation of the construction and mode of operation of a furnishing wheel feeder (RB 7, 8) adds

nothing to that in the petition, while the models shown in the pictures in respondents' brief convey a false impression by over-simplification and omissions.

Model DX-5A consisting of a pair of meshing gears with one gear movable by a handle toward and away from the other represents with reasonable accuracy a furnishing wheel feeder of the manually adjustable type. The model is provided with no means for automatic control of the movable gear and such a device can feed one yarn only. Accordingly, if an attempt were made to use a furnishing wheel feeder to supply the pile yarns to the thousand needles of a tufting machine at varying rates as determined by a pattern, a thousand such feeders would be required and it would be necessary to devise a pattern control mechanism capable of controlling the feeders individually. Moreover, a furnishing wheel feeder feeds its yarn with incidental slippage so that it is not obvious that a furnishing wheel feeder could supply its yarn accurately in varying lengths when operated at tufting machine speed of 600 cycles a minute with possible changes in the adjustment of the movable wheel relative to the fixed wheel occurring at the same rate.

Model DX-6A does not accurately represent the slat attachment of the Odenweller patent in suit in that it includes only one feature of the Odenweller attachment which distinguishes it from a furnishing wheel feeder, and fails to show others. The feature of the model which is original with Odenweller and was never disclosed or suggested before his work is the set of teeth on one drum varying in height in accordance with a pattern. The model is deficient in that it feeds a single yarn only, whereas the Odenweller attachment may feed a thousand yarns or more at the same time and at individually varying rates. The high and low teeth on the drum at the left in the model cannot convey the idea of slats running the full width of the tufting machine and notched for each of the many yarns passing between the two drums. The model does not include the

necessary guides for the individual yarns which are provided in the Odenweller attachment before and behind the drums and the model does not make clear that a slat attachment feeds yarns without slippage.

Model DX-6A is a typical product of hindsight prepared in an attempt to show that the devices of the patents in suit would have been obvious to a person of ordinary skill. However, under Sec. 103, a patent is invalid only if "the subject matter as a whole" would have been obvious to a person of ordinary skill. A determination of validity of the Odenweller patent cannot properly be made merely by comparing a model (DX-5A) representing a furnishing wheel feeder with a model (DX-6A) which shows only one feature of the Odenweller attachment, since a consideration of the attachment "as a whole" necessarily involves an examination of all the differences between the attachment and the feeder in purpose, construction, mode of operation, and results produced. Neither court below considered the respective patented attachments "as a whole" and thus neither Court properly applied one of the criteria of patentability set up in Sec. 103.

Respondents would have it appear (RB 9) that the Crawford attachment differs from that of Odenweller only in that the slats are mounted on chains instead of drums, and model DX-8A was constructed to show only that feature. The model is misleading for the reasons given in connection with model DX-6A and, in addition, model DX-8A omits an important feature of the Crawford attachment which was wholly original with Crawford, namely, the fixed parallel guides (IV, 1420; Fig. 3, parts 42, 50) which engage the lengths of the chains carrying the meshing slats and hold the chains parallel and the meshing slats in constant mesh. If the guides are not used, the parallel stretches of the chains bulge apart and this results in inaccurate yarn feeding. Such a bulge is visible in the vertical stretch in the chain at the right in the photograph of model DX-8A.

Respondents' assertion that the decisions of invalidity were right is equivalent to saying that a person of ordinary skill acquainted with furnishing wheel feeders would have had no difficulty in devising an attachment for feeding a large number of yarns to the needles of a tufting machine at individually varying rates in accordance with a pattern and would have at once made a slat attachment for the purpose. The fallacy in this assertion is that it assumes that the only difference between a wheel feeder and a slat attachment is that, with a feeder, a change in the rate of yarn feed is accomplished by varying the spacing between the wheel centers whereas, in a slat attachment, the rate of yarn feed is changed by varying the height of the slats. What the assertion ignores is that, in the use of a furnishing wheel feeder, the sole purpose is to feed a single yarn at a uniform rate, despite changes in yarn tension, in order to produce uniform stitches, and no one has ever operated a furnishing wheel feeder under the control of a pattern or devised a pattern mechanism for so doing. A slat attachment operates in the opposite manner to produce the opposite result; it feeds a large number of yarns independently of one another at non-uniform rates determined by the pattern and the result is pile loops of non-uniform height. The development of a slat attachment by a person familiar with furnishing wheel feeders would require him to forget the characteristic features and purpose of and the results produced by such a feeder and to create a wholly new element, namely, sets of meshing slats with the slats of one set notched to different depths as determined by the pattern. Such an achievement would necessitate a flight of the imagination far beyond the powers of an ordinary artisan and the Patent Office so held in granting the patents in suit in the face of prior patents on furnishing wheels.

Respondents say (RB 9) that the pattern attachments of the patents are shown to be obvious by the fact that the attachments were invented by a number of different people

at about the same time. There is no rule of law that mere multiple invention, simultaneous or not, establishes obviousness and, in every case cited by respondents (RB 10), the patent was clearly invalid for other reasons and the fact of multiple invention merely confirmed a decision based on other grounds. If multiple invention alone proved obviousness, there would be no need for such statutory provisions as 35 U. S. C. § 135 for determining priority of invention among multiple inventors; every patent act since that of 1793 has contained a corresponding provision.

Whether or not the slat attachment was obvious, that is, "capable of easy perception; requiring very little insight to perceive, recognize, or comprehend'"[5] is best shown by the history of the efforts of the several persons who attempted to solve the problem of providing independent control of the individual pile yarns being fed to a tufting machine. That history appears in Appendix C accompanying the petition and it shows that four inventors took periods varying from six months to about six years to devise the slat attachment now asserted to be obvious, and, in his initial effort, each one produced something, which was wholly different from a slat attachment and did not give the desired result. The failure of the joint inventors, Parker[6] and Short, to devise a slat attachment in their first attempt is especially strong evidence that the attachment was not obvious; at the time, they were familiar with a tufting machine having feed rolls with meshing gear teeth (III 1032-3) and they could have converted the rolls into a slat attachment merely by notching the teeth of one roll. But that simple change never occurred to them and they did did not conceive the slat attachment until about 18 months later and long after Odenweller and Crawford.

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[5] Webster's Third New International Dictionary, page 1559.

[6] Parker is a skilled inventor with more than 25 patents to his credit (III 1015-9).

Williams[7] knew about gears for feeding yarns (III 1200-1) at the time he first realized the desirability of feeding individual yarns to a tufting machine under independent control but he resorted to many unsuccessful expedients over a period of about six years before the slat attachment dawned upon him. That was long after its invention by Odenweller and Crawford (III 1157).

If the slat attachment was the obvious solution of the problem facing the four inventors, why did they not adopt it at once? If it was obvious, it was easy to perceive and such highly skilled persons as Parker and Short and Williams would never have passed it by for something else that proved to be a failure. Odenweller and Crawford had the same experience of initial failure. When the courts below held the slat attachment obvious despite the history of its development, they gave the word "obvious" a new and uncertain meaning and made Sec. 103 obscure and almost meaningless. The situation calls for an interpretation of that section by the Court and the petition should therefore be granted.

Respondents' Comment on the Third Reason for Granting the Petition Misses the Point

In the petition, we showed that the decisions below imposed on the claims in suit restrictions not required by the patents or by the proceedings in the Patent Office, denied petitioner the benefit of the doctrine of equivalents, and violated the canon of claim interpretation that a limitation expressed in one claim may not be implied in another. Respondents' only comment is the citation of a decision[8]

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[7] Williams is a highly ingenious person and has obtained two patents and made about 50 developments put into use in the tufting field (III 1117-20).

[8] *Westinghouse* v. *Boyden*, 170 U. S. 537, 568.

holding that "infringement is sometimes made out, though the letter of the claims be avoided" and vice versa. There can be no quarrel with the pertinence of the decision but it does not justify a holding of non-infringement in this case, where the accused attachment contains the same characteristic features as the patented attachment and performs the same function in the same way to produce the same result. Moreover, the cited decision does not nullify the doctrine of equivalents or the canon of claim interpretation relied on by petitioner.

Conclusion

This Court has made clear that, as a court of law, it will not grant certiorari in an ordinary patent case except to resolve a conflict between two Courts of Appeal and that it will not review concurrent findings of fact by two courts below in the absence of obvious and exceptional showing of error. The present case is not an ordinary patent case but presents as issues the proper interpretation of terms in Sec. 103 not heretofore considered by this Court and the proper application of the doctrine of equivalents and of a fundamental rule of patent claim construction. Petitioner has made an exceptional showing of error and has pointed out without contradiction by respondents that the principal findings of fact upon which the decisions below were based are in direct conflict with the evidence. Finally, the case involves an example of the failure of the trial court to perform its fact finding function and of the improper supervision of that function by the appellate court which calls the exercise by this Court of its supervisory authority.

The vice in the actions of the courts below lies not only in the injustice done petitioner but also in the evasion of the responsibilities of those courts to the public, the courts of other circuits, and possibly to this Court. The patents

are of great commercial importance and may well be the basis of litigation in other circuits. In any subsequent suit, the trial and appellate courts would ordinarily find the decisions in this case of assistance and entitled to substantial weight even though not controlling. If the patents are sustained in a later suit and ultimately come before this Court, the decisions here ought to be of help in resolving the conflict. However, in this case, the opinion and findings of the District Court prepared by counsel for the respondents and a four sentence *Per Curiam* decision by the Court of Appeals, which does not state the rationale of the decision or make clear the rules of law applied, will be of no help to any other court and are not entitled to the weight which the law normally accords them.

For the above reasons, the petition should be granted.

Respectfully submitted,

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